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No. 89-94

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1989

LARRY WITTERS,

Petitioner,

v.

WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Article I, section 11 of the Washington State Constitution provides that "* * * no public money * * * shall be appropriated for or applied to any religious * * * instruction. * * *".

1. Does the Free Exercise Clause prohibit the State from applying this provision of its Constitution to a ministerial student who requests state funding for religious instruction as part of his ministerial studies?

2. Does the Equal Protection Clause contain a similar prohibition?

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REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petitioner Mischaracterizes the Issues Involved and the Decision Below.

In his phrasing of the questions presented, in his statement of the case, and in his argument, the petitioner consistently misstates what this case is all about. He would have the Court believe (1) that he has been denied any opportunity to participate in the State's vocational rehabilitation program for the blind and (2) that the reason for this denial is his vocational objective, *i.e.*, to become a pastor, missionary, or Christian youth director. Neither assertion is correct. The petitioner may still participate in the rehabilitation program;

indeed, as we shall show below, the possibility exists that he may still use that program to assist him in his vocational objective.

What the decision below precludes him from doing, however, is using that program to obtain funding for religious instruction. And this is because Article I, section 11 of the State Constitution provides that "* * * no public money * * * shall be appropriated for or applied to any religious * * * instruction * * *".

To put into sharper focus the scope and grounds of the decision below, and the misleading characterization of that decision by the petitioner, it may be useful to distinguish between three factors which may come into play in a case such as this. The first is the vocational objective. Is it religious, *e.g.*, to be a minister? Or is it secular, *e.g.*, to be an accountant? The second factor is the nature of the school involved. Is it a religious school, such as the Inland Empire School of the Bible which the petitioner wishes to attend? Or is it secular, as is, *e.g.*, the University of Washington? And the third factor is the specific nature and content of the instruction. Is it religious, such as a course in theology? Or is it secular, such as a course in accounting?

The fundamental reason why the petitioner was denied the financial aid he seeks was not the first factor, the vocational objective; nor was it the second, the nature of the school he wishes to attend.[1] Rather, it was the third, the religious nature of the instruction and training which he seeks. For it is that factor, and only that factor, to which the relevant portion of Article I, section 11 is addressed.

To illustrate this critical point, assume that a Mr. Jones had already completed all the courses in theology and bible studies necessary to become a minister, and that the only courses remaining for him to qualify for the ministry were English composition and public speaking — courses of obvious usefulness for writing and delivering sermons. We see no

[1] It is interesting to note during oral argument before the superior court, counsel for the petitioner attempted to have counsel for the State stipulate that sole reason for denying the requested financial aid was the petitioner's career goal. Counsel for the State, of course, declined, and the effort at record-stuffing thus failed. (See Verbatim Report of Proceedings, pp. 13-14.) As the petition for certiorari shows, however, counsel for the petitioner remains undeterred, and the effort continues.

constitutional obstacle, under the decision below, to the State funding those additional courses — at least so long as they are secular in content.

Conversely, assume that Mr. Jones and Mr. Brown both wish to take a course in theology or bible studies, with Jones wishing to become a minister and Brown, who has no religious commitment whatsoever, simply wishing to pursue a subject which he considers interesting. The goal or motivation makes no difference; Article I, section 11 of the State Constitution prohibits the funding of these courses for both Jones and Brown, no matter what their reasons for taking these courses.

Next, assume that Jones, again wishing to become a minister, wishes to take his courses in English composition and public speaking at a religiously affiliated institution such as Georgetown University or even the Inland Empire School of the Bible. Again, there is no constitutional difficulty under the decision below, so long as the courses are secular in content.

In short, the problem with what petitioner wants arises from the type of instruction which he wishes the State to fund, not from his career goal or from the institution he wishes to attend.

To be sure, the fact that the petitioner wishes to study to become a minister, at a school for bible studies, is not entirely irrelevant. But these first and second factors are relevant only as they bear on the third factor, *i.e.*, on the nature of instruction which the petitioner seeks. Their presence sends up a red flag, alerting one to the obvious probability — if not inevitability — that religious instruction will be involved. But that is the *only* relevance of the first two factors — important as that might be in particular cases.

Counsel for the petitioner, it should be emphasized, has admitted the obvious. As pointed out in the decision below, he stated at oral argument before the State Supreme Court: "We would concede that Larry Witters is getting a religious education." Pet. 6a. With that concession, any possible doubts about the applicability of Article I, section 11 were removed.

II. The Free Exercise and Equal Protection Claims are Without Merit.

With the scope and grounds of the decision below properly understood, the petitioner's Free Exercise and Equal Protection claims are simply untenable. To invalidate the application of Article I, section 11 in this case would be to preclude any uniform and consistent application of that constitutional provision, and to grant, in effect, an exclusion from the scope of that provision for those who, like the petitioner, wish to pursue religious studies in order to prepare for a religiously oriented career.

No decision of this Court applying either the Free Exercise clause or the Equal Protection clause requires such a result. More specifically, the petitioner's reliance upon *Widmar v. Vincent*, 454 U.S. 263 (1982) and *McDaniel v. Paty*, 435 U.S. 618 (1978) is completely misplaced.

In *Widmar*, a group of students were being denied the right of free speech on public university facilities because of the religious content of that speech, while all other groups — over 100 in all — were granted free access to those facilities. Here, however, the petitioner's right to free speech, including religious speech, is in no way involved.

In *McDaniel*, a minister was denied, under a state constitutional provision, the right to hold public office, simply because he was a minister. Here, in contrast the petitioner is being denied a right denied to everyone else, without exception, *viz.*, the right to state funded religious instruction.

Finally, a comment regarding *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1981), upon which the petitioner also improperly relies.

This Court has found governmental coercion sufficient to trigger the protection of the Free Exercise Clause in situations where the government forces individuals to choose between the relinquishment of a governmental benefit and the compromise of religious belief. In *Sherbert*, for example, a Seventh Day Adventist had been discharged for her refusal to work on Saturday, which was her Sabbath, and was denied unemployment benefits on the ground that her refusal to work on Saturday was not a permissible reason for declining to accept work. The Court noted that "no criminal sanctions

directly compel [Sherbert] to work a six-day week," but observed that her "declared ineligibility for benefits derives solely from the practice of her religion" and that "the pressure upon her to forego that practice is unmistakable." 374 U.S. at 403, 404.

The Court stated that the denial of Sherbert's claim for unemployment benefits had the effect of forcing her to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. It concluded that "[g]overnmental imposition of such a choice puts *the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship*" (*ibid.*, emphasis added). *Sherbert* and its progeny thus stand for the proposition that the Free Exercise Clause's protection for religiously grounded conduct is called into play when the government subjects an individual to the choice of obtaining a benefit or complying with the dictates of faith, "* * * thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-718.

In *Thomas*, a Jehovah's Witness was likewise denied unemployment benefits because he refused to accept a transfer from his employer to a job which involved working on military weapons — making turrets for military tanks. Following *Sherbert*, the Court reinstated the benefits.

One cannot, of course, adhere to the beliefs of the Seventh Day Adventists while working on a Saturday; nor can one adhere to the beliefs of the Jehovah's Witnesses while making military weapons.

The petitioner, in contrast, is not prevented from adhering to any of his religious beliefs. As stated by the Court in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. ___, 99 L. Ed. 2d 534 (1988):

> The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the govern-

ment." *Sherbert, supra,* at 412, (Douglas, J., concurring). 99 L.Ed. 2d at 547-548.

Lyng placed the proper limits on the scope of *Sherbert* and *Thomas* — limits which are applicable here as well.

III. The Supremacy Clause Question is not Properly Presented.

We here must confront a problem which has plagued this case from its inception ten years ago. We refer to the sparcity of the record, and more specifically to the absence of any evidence as to how the vocational rehabilitation program actually operates.

The reason for this sparcity is that from the inception of this case the State's focus was on state constitutional provisions, with primary reliance on Article I, section 11, while the petitioner's principal focus was on the Free Exercise Clause. At no stage in the administrative proceedings at the agency level, where the record was actually made, did the petitioner claim that Article I, section 11 was inapplicable because he was not really seeking religious instruction or because state moneys would not be used to pay for it. For these reasons, there was no need to inquire closely into the operation of the program, the exact nature of the courses petitioner wished to take, or the nature of the funding sources. Indeed, after the initial decision denying the requested financial aid, the decision went through three separate levels of administrative review. At each level, Article I, section 11 provided the basis for affirming the initial decision; and at none of these levels did the petitioner make the claim he now asserts, *i.e.,* that the use of federal matching funds in financing the program somehow precludes the application of Article I, section 11. Nor did he present any evidence about the operation of the program which might support such a claim.

That claim is really an afterthought, and seems to stem from the dissenting opinion of Justice Utter in the second State Supreme Court decision. See Pet. 14a-15a. It should be too late to make it now, especially in view of the sparcity of the record.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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